

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IN RE: BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Debtor.

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ORAL ARGUMENT RELATING TO DOCKET NOS:

Docket No. 11-5207

Docket No. 11-5044

Docket No. 11-5051

Docket No. 11-5175

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IRVING H. PICARD, TRUSTEE FOR THE
LIQUIDATION OF BERNARD L. MADOFF
INVESTMENT SECURITIES LLC,

Plaintiff-Appellant,

SECURITIES INVESTOR PROTECTION CORPORATION,

Intervenor-Appellant,

vs.

HSBC BANK PLC, et al.,

Defendants-Appellees.

-----x
IRVING H. PICARD, TRUSTEE FOR THE
LIQUIDATION OF BERNARD L. MADOFF
INVESTMENT SECURITIES LLC,

Plaintiff-Appellant,

SECURITIES INVESTOR PROTECTION CORPORATION,

Intervenor-Appellant,

vs.

JPMORGAN CHASE & CO., et al.,

Defendants-Appellees.

-----x
November 21, 2012

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IRVING H. PICARD, TRUSTEE FOR THE
LIQUIDATION OF BERNARD L. MADOFF
INVESTMENT SECURITIES LLC,

Plaintiff-Appellant,

SECURITIES INVESTOR PROTECTION CORPORATION,

Intervenor-Appellant,

vs.

UBS AG, et al.,

Defendants-Appellees.

-----x
IRVING H. PICARD, TRUSTEE FOR THE
LIQUIDATION OF BERNARD L. MADOFF
INVESTMENT SECURITIES LLC,

Plaintiff-Appellant,

SECURITIES INVESTOR PROTECTION CORPORATION,

Intervenor-Appellant,

vs.

HSBC BANK PLC, et al.,

Defendants-Appellees.

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November 21, 2012
10 a.m.
Daniel Patrick Moynihan
U.S. Courthouse
Ceremonial Courtroom
500 Pearl Street
New York, New York 10007

B E F O R E:

HON. DENNIS JACOBS, Chief Judge

HON. SUSAN CARNEY

REPORTED BY:
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BENDISH REPORTING, INC.
Litigation Support Services

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1 JUDGE JACOBS: Judge Winter is on
2 this panel but he is unable to sit with us this
3 morning. He will have the benefit of oral
4 argument and he will participate in the
5 disposition of these appeals.

6 In doing so, I'll try to lay out a
7 sensible way of hearing the various parties in
8 the Madoff cases.

9 In Re Bernard L. Madoff Investment
10 Securities, unless the parties have a sensible
11 alternative that is intuitive, we will hear
12 Picard for 20 minutes and SIPC for 15. That
13 will be followed by ten minutes each from the
14 following parties in this order: JPMorgan,
15 Egger, Bank Austria, Pioneer, and HSBC, and then
16 we'll hear Picard for ten minutes and SIPC for
17 five minutes.

18 I'll read that again because it's
19 very complicated. Picard for 20 minutes, SIPC
20 for 15, followed by ten minutes each and the
21 following five parties: JPMorgan, Egger,
22 UniCredit Bank Austria, Pioneer, HSBC. They
23 will be followed by Picard for ten minutes in
24 rebuttal and SIPC for five minutes in rebuttal.

25 Does that create a serious problem?

1 We might as well work this out before we sail
2 into this.

3 MR. SAVARESE: Yes, Your Honor.
4 John Savarese for JPMorgan. We did confer among
5 ourselves beforehand --

6 JUDGE JACOBS: And you divided the
7 time?

8 MR. SAVARESE: We have, and we've
9 divided it by substantive topics. That is, the
10 order that Your Honor is approaching, with some
11 minor adjustment, will make sense.

12 JUDGE JACOBS: Tell me how it will
13 make sense. If you'd like me to repeat it, I
14 will.

15 MR. SAVARESE: Yes. I intend to go
16 first on behalf of JPMorgan, precisely as Your
17 Honor said, and my focus will be -- and we
18 discussed this with counsel for the Trustee --
19 is on the trustee standing case law, the Wagoner
20 and Caplin line of cases and the question of
21 trustee standing.

22 JUDGE JACOBS: You'll be speaking
23 for how many minutes?

24 MR. SAVARESE: Ten minutes.

25 Second, Tom Moloney, representing

1 HSBC, we would propose to have go second and
2 speak for ten minutes. And Mr. Moloney's focus
3 will be on the SIPA statutory scheme itself.

4 Third, Mr. Schnabl, representing
5 UniCredit, we would propose to have Mr. Schnabl
6 go third for ten minutes. So we're slightly
7 proposing a change, Your Honor, of the order in
8 which you would call us up to the podium.

9 Mr. Schnabl is prepared to focus on the
10 Redington case and the issues of standing under
11 common law.

12 Fourth, following Mr. Schnabl,
13 Mr. King, Marshall King, who represents UBS,
14 would come to the podium to talk about any
15 questions Your Honors may have with respect to
16 the contribution theory.

17 And then, finally, Mr. Velie,
18 representing Bank Austria -- so Mr. Velie is in
19 a different order from what Your Honor has
20 suggested -- would address any other standing
21 arguments.

22 I think that's a sensible way to
23 sort of order this. We hoped that that would
24 ease the Court's task. We know there are a lot
25 of issues and a lot of parties before you.

1 JUDGE JACOBS: I was hoping that
2 there would be a sensible proposal. I just
3 wanted to put something out that there would be
4 a framework.

5 MR. SAVARESE: No, we're glad to
6 have done it.

7 JUDGE JACOBS: We will do it this
8 way.

9 MR. SAVARESE: Perfect.

10 (Recess taken.)

11 JUDGE JACOBS: At this time we'll
12 hear Picard versus JPMorgan Chase, Egger and
13 UniCredit, Pioneer and HSBC.

14 MR. WARSHAVSKY: Good morning, Your
15 Honors.

16 JUDGE JACOBS: Good morning.

17 MR. WARSHAVSKY: May it please the
18 court, Oren Warshavsky of Baker & Hostetler for
19 the Appellant, Irving Picard. Good morning,
20 Your Honors. We're here this morning -- let me
21 start that again.

22 For the past 30 years the Trustee,
23 before the district courts below, the Trustee, a
24 SIPA Trustee could bring the exact type of
25 claims that the Trustee brought here. That was

1 what all courts that had examined these issues
2 had understood the law to be.

3 What I would submit to Your Honors
4 is that that position is supported not just by
5 the SIPA statute but actually all of the
6 citation that we have in these various cases,
7 whether we look at Wagoner and its progeny,
8 including the Kirschner decision or the In Re
9 Mediators, the Redington decision, of course, as
10 well as some of the decisions in this case,
11 including the Net Equity decision as well as the
12 Rosenman decision.

13 And what I'd like to do is actually
14 start with the SIPA statute itself. The SIPA
15 statute itself is a customer protection statute
16 and it's different than a traditional bankruptcy
17 statute. The Bankruptcy Code is all about
18 protection of the debtor, protection about
19 creditors of the debtor.

20 Starting in the '30s Congress
21 realized that the bankruptcy -- then it was the
22 Bankruptcy Act -- did not provide protection
23 that typical customers in the brokerage industry
24 needed. They enacted Section 60 of the Chandler
25 Act, that didn't work, and then in 1970 Congress

1 enacted SIPA. And it enacted SIPA for the sole
2 purposes -- an overlay to the bankruptcy code --
3 for the sole purpose of protecting customers.

4 And the SIPA statute wasn't enacted
5 in a vacuum. It was enacted in -- to work hand
6 in hand with the securities laws, as well as the
7 enactment at the same time of Rule 15c3-3 of the
8 Exchange Act.

9 Under Rule 15c3-3 of the Exchange
10 Act a broker/dealer is supposed to segregate
11 funds. A broker/dealer, so that when an
12 investor comes and invests, the broker/dealer --
13 the funds or the securities that are transferred
14 into the broker/dealer's possession remain
15 property of the customer, they remain the
16 property of the debtor.

17 If a customer of a broker/dealer
18 seeks the return of his securities or her cash,
19 that customer is entitled to it, and 15c3-3
20 requires it. It requires it by operation of
21 law. That works hand in hand with the
22 definition of customer property --

23 JUDGE JACOBS: What do you do with
24 the general proposition that a bailee can't be a
25 thief? If you've stolen it, you're not holding

11

1 it for bailment.

2 MR. WARSHAVSKY: Well, I think
3 that's when the bailment arises under state
4 common law. Here what we have is federal law
5 that requires --

6 JUDGE JACOBS: There's no federal
7 law of bailment, so as far as I know. I hardly
8 remember the state law of bailment.

9 MR. WARSHAVSKY: Well, luckily I'm
10 not going to recite the state law of bailment.
11 I'll go to the federal law, which in 15c3-3
12 itself it requires a segregation. It requires
13 the broker to keep property for the customer,
14 and what the broker has is possession of the
15 property, but he holds -- he or she holds it for
16 the benefit of the customer. That's the
17 definition of a bailment.

18 In point of fact, when you think
19 about a bailment, a bailment really is the
20 lowest level of interest somebody could have in
21 a piece of property, and that's what we have
22 here. The broker has --

23 JUDGE CARNEY: Why didn't the
24 statute use the term bailment or describe the
25 Trustee as a bailee then?

12

1 MR. WARSHAVSKY: Well, I hadn't
2 gone to the SIPA statute yet, but I think 15c3-3
3 under the Securities Act -- I don't know why it
4 didn't use the word bailment. I wish I could
5 come to you and give you the silver bullet
6 answer to that. I don't have one. It clearly
7 does not use the term bailment.

8 However, there's no other --
9 there's no other legal relationship by which
10 that -- I'm sorry -- there's no other
11 nomenclature by which we could use to define
12 that relationship. All the broker has is a
13 possessory interest in that property.

14 JUDGE CARNEY: I mean, it created a
15 special overlay on to the broker/dealer
16 relationship potentially and a set of rights and
17 duties that were sui generis -- or engrafted
18 maybe on to kind of a bankruptcy setting and a
19 bankruptcy background, and that's why I'm
20 confused about your reliance on the notion of
21 bailment, where that really is not explicit in
22 the statute and doesn't seem to be the premise
23 of the overall SIPA.

24 MR. WARSHAVSKY: Well, actually, I
25 think it is the premise of SIPA, because what

1 SIPA does -- if we just looked at the Bankruptcy
2 Code, everything would flow through the debtor.
3 What SIPA does is SIPA defines customer property
4 and customer property -- I was speaking before
5 about the Securities and Exchange Act.

6 What SIPA does is SIPA comes in
7 once a broker/dealer fails, once a broker/dealer
8 is insolvent, and SIPA has a definition of
9 customer property, which means property that by
10 its nature belongs to the customers, not to the
11 debtor, not to the Trustee, frankly.

12 And SIPA actually broadens the
13 definition of customer property. It's not just
14 what was segregated in the 15c3-3 account or
15 what was supposed to be segregated in a case
16 like this, but also all property which -- in the
17 possession of the debtor which could have been
18 used or which should have been in that fund, as
19 well as all property that the -- that the
20 Trustee can bring back into the estate.

21 So, for instance, if -- as in a
22 typical Ponzi scheme or a case like this where
23 one customer's property is stolen and given to
24 another customer, a traditional bankruptcy
25 trustee has no right to do anything or to bring

1 a cause of action there because it was never
2 property of the debtor.

3 SIPA creates the legal fiction
4 under 78fff-2(c)(3) and it allows the Trustee to
5 treat that -- for the sole purpose of bringing
6 the avoidance action and bringing property back
7 into the estate, it allows -- it creates a legal
8 fiction which allows the Trustee to treat the
9 property as though it were property of the
10 debtor. It actually grants standing to bring
11 that money back into the estate, with the idea
12 being but not -- I'm sorry -- I guess the main
13 point being, not that it would go into the
14 general estate, not that it would go to the
15 estate of the debtor, but that it would be
16 brought back into the Fund of Customer Property,
17 and the reason that's important here is the way
18 the statute works.

19 Now, in the Rosenman case it was
20 called -- which is part of this liquidation --
21 was referred to as the customer property estate,
22 other cases call it the Fund of Customer
23 Property, the statute refers to the Fund of
24 Customer Property, but the money comes into the
25 fund.

1 And the only people -- or the only
2 entities that can get money from the Fund of
3 Customer Property are customers. The Fund of
4 Customer Property cannot be used to pay off the
5 debtors. And, in fact, when the statute uses
6 the term "customer" for those who can
7 participate in that fund, it explicitly removes
8 shareholders, capital investors, individuals or
9 entities that loan money, debenture holders, it
10 excludes all of those entities.

11 JUDGE JACOBS: But isn't the issue
12 how the Trustee can go about filling that fund
13 or replenishing that fund, I mean, if you find,
14 you know, money that's available for
15 replenishing the fund in the hands of the
16 debtor, then that goes into the fund?

17 The question is: Can you go
18 against third parties asserting rights that
19 would, in the usual course, be rights assertable
20 by the customers in order to get that money, put
21 it in the fund and then distribute it according
22 to the Trustee's own internal rules, which we
23 have affirmed, but, you know, they are -- it
24 seems like a different beast.

25 MR. WARSHAVSKY: Well, I think --

1 the way the statute is set up is that the
2 Trustee is the Trustee of this estate, the
3 trustee of the fund, and ultimately if the fund
4 is full -- and in this case we're only talking
5 about principal -- if the fund is full, of
6 course, then the Trustee has no more standing on
7 behalf of the fund.

8 However, in a case which might be
9 six months or eight months or ten months, the
10 Trustee probably could bring back all money in
11 by virtue of avoidance actions, it might be able
12 to.

13 Here, however -- and I'd like to
14 actually -- to respond to your question, Your
15 Honor, I'd also point to the St. Paul case and
16 the Mediators case in this court because I think
17 those are instructive.

18 Number one, the statute does -- as
19 a customer protection the statute does put the
20 SIPA Trustee in the position of bringing claims
21 for common injury to the fund. St. Paul
22 breathes life into that, suggesting that when
23 claims are not particularized, that the Trustee
24 is the proper party to avoid -- in this case we
25 have 4900 account holders -- to avoid 4900

1 different lawsuits, but there's another point
2 here too, which is, when you look at St. Paul
3 and you look at Mediators -- and I think this
4 goes back to the first question too about why
5 it's different then the fund -- I'm sorry -- why
6 it's different than a traditional bankruptcy
7 case.

8 When you look at the Mediators
9 case, the Mediators case, decided by Judge
10 Winter, actually stood for a few propositions,
11 but one was -- in the Mediators case there were
12 creditors, creditors of the debtor who came and
13 said by virtue of the injury to the debtor, they
14 were going to assert claims.

15 They were found in pari delicto.
16 Why, because their claims arose through the
17 debtor. Here -- and through damage to the
18 debtor.

19 Here if we brought -- if customers
20 were to bring their own claim, their claim would
21 be through damage to their property. Again,
22 when we employ 15c3-3 under the Code, the
23 definition of customer property under SIPA, the
24 damage is to the Fund of Customer Property, not
25 to Bernard L. Madoff. And, therefore, if these

1 customers were to bring the act on their own --
2 if each one were to bring a lawsuit on their
3 own, no one would suggest that they were in pari
4 delicto. In point of fact, they'd be clean.

5 JUDGE JACOBS: Sure.

6 MR. WARSHAVSKY: They, and sorry --
7 I'm sorry, did I interrupt, Your Honor?

8 JUDGE JACOBS: I think what you're
9 leading up to is the idea that the SIPA Trustee
10 has some different powers and title than a
11 trustee in a case under Title 11 and we know
12 that that can't be because the statute says that
13 the SIPA Trustee has the same powers as the
14 Trustee under Title 11.

15 MR. WARSHAVSKY: He does have the
16 same powers but --

17 JUDGE JACOBS: The same title and
18 the same powers.

19 MR. WARSHAVSKY: Well, I guess
20 where I would disagree as to title is that in a
21 typical bankruptcy we don't have the fund of
22 customer property. They were a bailment in a
23 typical bankruptcy and the Trustee were to
24 accede to that bailment, the Trustee wouldn't be
25 coming in as the Trustee of the debtor and

1 bringing claims on behalf of the debtor's
2 property. The Trustee would actually be
3 bringing claims on behalf of the bailed property
4 and that's all we have here.

5 What we have here is not -- again,
6 I started with the distinction about the
7 Bankruptcy Code being a debtor protection
8 statute. A typical Chapter 11 bankruptcy
9 trustee only brings claims to -- on behalf of
10 the debtor, only property that was property of
11 the debtor, only injury -- only to address
12 injury that was injury to the debtor.

13 Here we're not talking -- when we
14 we're talking about the SIPA Trustee and solely
15 for the recovery of the Fund of Customer
16 Property, not the general estate, because SIPA
17 does create two estates -- or what I'll call two
18 estates and what I think at least makes sense
19 for discussion purposes and that I think is why
20 the Rosenman court used those terms.

21 There's the general estate, which
22 is just like any other bankruptcy estate, which
23 may pay off other loans, may pay off fraud
24 claims, and then there's the customer property
25 estate, which particularly in this case all it

1 is doing is returning to customers their
2 property.

3 JUDGE CARNEY: Well, except to the
4 extent it's called on to do that pro rata, after
5 assembling more and going after other funds that
6 could properly be included as customer property.
7 It's not really returning the same thing. I
8 mean, there are aspects of this are unlike
9 ordinary bailment, I think you have to agree.

10 MR. WARSHAVSKY: I agree in the
11 facts of this case, but if we were to take a
12 look at another SIPA proceeding, such as Lehman
13 Brothers, where no one went in and raided the
14 Fund of Customer Property, those were turned
15 back over to the customers.

16 In fact, when there are
17 specifically identifiable customer name
18 securities, those are returned to the customer.
19 Here it's a bit more like, you know -- one of
20 the cases that was cited -- I know it's an old
21 case -- but it was cited by SIPC had to do with
22 grain. We have fungible -- ultimately here all
23 we have is fungible property. All we have --
24 there were no securities that were ever
25 purchased. All we have is really -- as you see

1 the net equity decision, cash in/cash out, and
2 cash being fungible, the only way -- by virtue
3 of the shortfall, the only way to return
4 property is to do it on a pro rata basis.

5 JUDGE CARNEY: It's still a little
6 inconsistent with the basic notion of bailment,
7 I would think.

8 Could you go back to St. Paul for a
9 minute and explain how that supports your
10 argument because I see St. Paul as still looking
11 at customer claims that are premised on the
12 existence of the estate itself having a claim,
13 the debtor estate having a claim, as opposed to
14 being independent of that.

15 MR. WARSHAVSKY: Well, I think --
16 I'm not -- trying to answer that precisely. I'm
17 just trying to get my words.

18 In a -- what St. Paul stood for was
19 that if there was a claim that could be brought
20 by any debtor for the same -- for a common
21 injury, the claim belonged to the estate, the
22 idea being not that there -- I'm sorry -- did I
23 say any debtor? I meant any creditor -- I'm
24 sorry -- that if a claim could be brought by any
25 creditor of the estate, then it was property of

1 the estate.

2 And the reason for that is actually
3 just like I would say concurrent with the SIPA
4 statute in that we don't want 4900 lawsuits and
5 we don't want a race to the courthouse.

6 JUDGE CARNEY: Again, wasn't that
7 in the context of a situation where the estate
8 itself clearly had an alter ego claim, so these
9 were addition to that, as opposed to independent
10 of the company's alter ego claim.

11 MR. WARSHAVSKY: Well, and I think
12 that's right, and I think that's because St.
13 Paul arose in a traditional bankruptcy where all
14 there was was a debtor estate. To the extent
15 creditors would have claims in common, it would
16 be through the injury to the estate itself, or
17 the debtor itself.

18 Here again the injury to the
19 customers, which is common, which is basically
20 through the deepening of the insolvency here,
21 the injury to all customers is the disappearance
22 of their money and the fact that Madoff
23 declared -- you know, was running a Ponzi
24 scheme. So all customers were injured through
25 those actions. And the claim arises through the

1 damage to the fund. It's by virtue of the fund
2 not being there.

3 Did I answer your question?

4 JUDGE CARNEY: I still see that
5 there was -- that the debtor estate itself had
6 an alter ego claim --

7 MR. WARSHAVSKY: Right.

8 JUDGE CARNEY: -- that is not
9 present here and that's why --

10 MR. WARSHAVSKY: Here in the first
11 four common law causes of action asserted by the
12 Trustee in most of these -- other than
13 contribution causes of action asserted by the
14 Trustee in this case, they cannot -- the
15 customers' claims certainly do not arise through
16 damage to BLMIS. They strictly arise through
17 damage to the Fund of Customer Property.

18 It's our belief -- but, again, I
19 guess what we would go back to is the Fund of
20 Customer Property is established only for
21 participation by customers and, therefore, what
22 we say is everybody, every customer has a common
23 claim there and it's through that common injury.

24 JUDGE JACOBS: You're saying the
25 customer has a common claim, but isn't an

1 element of almost all of your causes of action
2 reliance?

3 MR. WARSHAVSKY: No, I don't think
4 -- no, I don't think they are. I think that an
5 element to our causes of action might be
6 customers' reliance on Bernard Madoff. What
7 we've alleged in all of our causes of action is
8 really aiding and abetting causes of action.

9 If you look at the HSBC or
10 UniCredit complaints, what we have is aiding and
11 abetting breach of fiduciary duty, aiding and
12 abetting fraud, and so the reliance by the
13 customers was on Bernard Madoff. I think
14 everybody would agree that innocent customers
15 with a valid customer claim all relied, to their
16 detriment, on Bernard Madoff.

17 So I guess reliance -- yes, to
18 answer to your question, reliance is an element,
19 but it's reliance on Bernard Madoff, not
20 reliance on these defendants.

21 If I may quickly turn to -- did I
22 answer both of your questions on that?

23 JUDGE JACOBS: We have your
24 answers.

25 My colleague Mr. LaRosa will speak

1 more to the issue of SIPC's right of
2 subrogation, which is also a standing issue, but
3 I would point out that in both of these cases if
4 we look to -- I'm sorry -- both of the decisions
5 below and in all of these cases, if we look to
6 the plain language of the statute, 78fff-3(a),
7 it is very clear that SIPC's rights of
8 subrogation against the estate are not to the
9 exclusion of SIPC's other equitable
10 subordination rights.

11 Finally, I do want to go quickly to
12 the Trustee's contribution claims, because the
13 Trustee's contribution claims there we do have
14 to acknowledge that we are stepping into the
15 shoes of Bernard Madoff. The only way -- and
16 BLMIS -- and the only way we can accede to those
17 claims is by virtue of being a joint tortfeasor.

18 What the Trustee is doing -- I'd
19 like to give a quick example, if I may, of the
20 type of claim that the Trustee has raised
21 because there are specific claims and there are
22 general claims, but here what we've accused some
23 of these defendants of doing is they were
24 custodians for funds, for overseas funds, and
25 they were supposed to hold on to all assets, to

1 all securities, all cash, and they got paid for
2 that, and that's what gave customers confidence
3 investing into these feeder funds, many of these
4 customers not even knowing that Bernard -- that
5 the money was ultimately going to Madoff.

6 The money did and the duties, the
7 custodial duties were just transferred to Madoff
8 for free, by the way. Madoff didn't charge
9 these defendants -- may I finish this example?
10 I see my time is running.

11 JUDGE CARNEY: Go ahead.

12 MR. WARSHAVSKY: These defendants
13 continued to collect their fees but had
14 basically delegated Madoff as their agent. And
15 our -- and now the funds themselves have claims
16 in this bankruptcy for billions of dollars
17 against this -- in this -- against -- in the
18 Trusteeship -- I'm sorry -- in this liquidation.
19 And the Trustee's position is, to the extent
20 that the Trustee has to pay those claims, these
21 defendants, these custodians who were supposed
22 to be holding the assets are joint tort feorsors
23 and at least responsible for a share of the
24 damage and to pay for those claims.

25 JUDGE CARNEY: My understanding of

1 New York law -- if I could have a second -- is
2 that if a joint tort feisor is going for
3 contribution against a fellow, that you need to
4 have paid up to at least your pro rata share
5 before you can have sustained the right of
6 contribution.

7 How do you reconcile your client's
8 situation with that?

9 MR. WARSHAVSKY: Well, actually
10 under New York law to collect -- to actually
11 enforce a contribution judgment, we'd have to
12 pay more than our fair share, but under New York
13 law -- and we cited cases, and I'll bring the
14 case to you when I come back up on rebuttal --
15 but it's very clear that the action may be
16 maintained from the outset. The right of
17 enforcing what we'll call the contribution
18 judgment only can occur once the Trustee has
19 paid more than his fair share.

20 What I'll also note is that in this
21 case the Trustee has satisfied the claims of 800
22 customers -- not of every customer -- but of
23 certain customers. But, as I say, under New
24 York law -- and I will gave you the case names
25 -- New York Court of Appeals is very clear that

1 a defendant may maintain his or her action up
2 until and only is precluded from collecting the
3 money -- until he or she has paid more than his
4 or her fair share.

5 JUDGE CARNEY: Thank you.

6 MR. WARSHAVSKY: Thank you.

7 MR. LA ROSA: Good morning, Your
8 Honors. Mr. LaRosa on behalf of the Securities
9 Investor Protection Corporation.

10 I would like to focus on two
11 things: Bailment and subrogation, those were
12 the topics we addressed in most detail in our
13 briefs, but bailment with particular reference
14 to the bailment created during the
15 pre-liquidation period, because it's really the
16 pre-liquidation bailment that's created by the
17 interaction between both 15c3-3 and the common
18 law of bailment that carries over into the SIPA
19 liquidation and enables the Trustee, the
20 successor to the bailee status of the
21 broker/dealer, to serve -- you know, to bring
22 actions as the bailee of customer property.

23 There are only two things that are
24 required for a bailment implied in law and
25 that's what we have here: Lawful possession,

1 however acquired, however acquired -- and that
2 is the language that's found in the case law --
3 and a duty imposed by law that the bailee
4 account for the property in question as the
5 property of another.

6 Rule 15c3-3, with respect to
7 property received by a broker/dealer from
8 customers, creates exactly those conditions.

9 Under the rule, a customer --
10 quote/unquote -- and that's a term of art -- is
11 any person with whom a broker/dealer has an
12 account relationship and from whom or on whose
13 behalf a broker/dealer has received required
14 funds or securities. When the broker/dealer has
15 established a customer relationship, the
16 broker/dealer has not only the right but the
17 obligation to reduce to possession funds and
18 securities tendered in the context of the
19 account relationship.

20 So that obligation exists and that
21 obligation exists, importantly, irrespective of
22 what the broker intends to do with it. The
23 broker's obligation is, once the property is
24 acquired apply, irrespective of the broker's
25 intent with respect to that property then

1 imposed by law.

2 So the broker's possession of
3 property tendered in the context of an account
4 relationship is lawful without regard to whether
5 or not the broker intends to steal the property,
6 comply with Rule 15c3-3. It is a lawful -- it
7 is, in effect, a determination that, as a matter
8 of law, possession is lawful by virtue of the
9 nature of the relationship between the parties.
10 So the -- in our view, the element of lawful
11 possession is satisfied once the nature of the
12 relationship is established.

13 It's also clear that there is a
14 duty on the part of the broker/dealer to account
15 for the property received as the property of
16 another. The broker/dealer is required to hold
17 in its possession at all times securities of the
18 type and in the quantity owed to all customers.
19 They don't have to be the same securities
20 tendered by the customers because the law
21 recognizes, as bailment law recognizes, that
22 fungible property can be substituted.

23 There's no reason why a
24 broker/dealer should have to segregate the same
25 dollar tendered by a customer because one dollar

1 is just like another; in the same way there's no
2 reason why a broker/dealer should have to
3 segregate a share of Xerox that is the same
4 class and issue as any other share of the same
5 class and issue, they're identical, they're
6 functionally identical. So you have all of the
7 elements that are necessary for a bailment
8 implied in law.

9 Ratable distribution -- I think
10 there was a question about ratable distribution.
11 That is consistent with bailment. When you have
12 bailment that -- and I think it's important to
13 recognize, both 15c3-3 and SIPA treat the
14 bailment that's created as, in effect, a
15 collective bailment. The bailors, the customer
16 bailors collectively bail their property with
17 the debtor bailee.

18 When you have a collective bailment
19 and when fungible property that's collectively
20 bailed is co-mingled and is lost, bailment law
21 provides that the remaining property will be
22 distributed ratably to the bailors. And you see
23 this most commonly, I think it was mentioned in
24 the commodities cases that come out of the
25 midwest. A bunch of grain producers all take

1 their grain to the same warehouseman and all the
2 grain is dumped into the same grain silo and a
3 tornado comes along and blows the roof off and
4 half the grain is gone.

5 Well, it's okay to co-mingle the
6 property because it's fungible and it's
7 segregated on the books and records of the
8 warehouseman, so the warehouseman knows exactly
9 how much grain goes to each party, and that
10 conforms with the segregation requirements
11 imposed by bailment law.

12 And you can't distribute the
13 property that's left any way that's fair except
14 ratably, that's the only way to do it, you know,
15 consistent with fairness. So it's been
16 recognized in a number of cases that where you
17 have that fact pattern, which is what you
18 typically have in a SIPA liquidation, ratable
19 distribution is appropriate and is consistent
20 with bailment.

21 With regard to subrogation. SIPC
22 has subrogation rights that come from two
23 sources: The common law and the statute. The
24 statute provides expressly that SIPC shall have
25 subrogation rights. There's nothing in the

1 statute that says that those rights are limited
2 to claims against the customer fund. In fact,
3 the only limitation is a temporal limitation.
4 SIPC can't assert its rights until after the
5 Fund of Customer Property has been allocated.

6 Well, of course, that makes perfect
7 sense. It wouldn't -- you know, to the
8 extent -- SIPC has a claim against the customer
9 fund as subrogee but it doesn't mean that just
10 because it has a claim against the customer
11 fund, it doesn't have a claim against anybody
12 else. And certainly vis-à-vis its claim against
13 the customer fund, it can't assert that until
14 customer property has been allocated. It
15 wouldn't -- it would be crazy -- in effect, it's
16 stating the obvious, but there isn't any other
17 limitation and to read into --

18 JUDGE JACOBS: Does SIPC get the --
19 what's left or do they take first dollar?

20 MR. LA ROSA: SIPC stands in the --
21 SIPC will only collect against -- vis-à-vis the
22 customer fund you mean?

23 JUDGE JACOBS: Yes.

24 MR. LA ROSA: Yeah, SIPC will
25 stand -- will only collect with respect to

1 customers who have been satisfied in whole. So
2 SIPC stands in the shoes for purposes of
3 recovery against the customer fund of the
4 customers who have been satisfied in whole.
5 Remaining customers, you know, have -- the
6 so-called over the limits customers acquire
7 their ratable share based on -- whatever that
8 is -- based on their, you know, the amount of
9 their claims and the proportion of their claims.

10 There's certainly nothing and
11 there's neither anything in the language of
12 78fff-3(a) and nothing in the legislative
13 history to the section that suggests that beyond
14 its statutory rights, that SIPC's common law
15 rights of subrogation are in any way limited.
16 The statute, in fact, on the contrary, says that
17 SIPC shall have all other rights that it may
18 have in law and in equity.

19 Now, the defendants here try to
20 make a big deal about how this was a technical
21 amendment, and so on, but it was technical only
22 in the sense that it codified what had been
23 established in Redington and what had been
24 understood to be SIPC's common law rights --

25 JUDGE JACOBS: But do I understand

1 then that the SIPA Trustee seeks to replenish
2 the customer fund for the benefit of SIPC in
3 terms of the last dollars that would come into
4 that fund after individual customers have been
5 satisfied in whole?

6 MR. LA ROSA: The -- in --

7 JUDGE JACOBS: In other words --

8 MR. LA ROSA: Yeah, go ahead.

9 JUDGE JACOBS: -- is it 20 percent
10 up to a certain amount, is that it? What's the
11 compensation from SIPA?

12 MR. LA ROSA: It's up to 500,000
13 for a claim for securities.

14 JUDGE JACOBS: Up to 500,000?

15 MR. LA ROSA: Yeah.

16 JUDGE JACOBS: Well, let's say it's
17 a million, then the first half million that goes
18 in allocable to that customer goes directly to
19 that customer?

20 MR. LA ROSA: Well, as I say, if
21 that customer were -- let's take the
22 hypothetical where you have no property in the
23 Fund of Customer Property or where you've got a
24 property that -- SIPA's made its advance of a
25 half million dollars --

1 JUDGE JACOBS: Let's says it's all
2 been stolen.

3 MR. LA ROSA: -- it's all been
4 stolen, some money now comes in. How do we
5 allocate that?

6 JUDGE JACOBS: Yeah.

7 MR. LA ROSA: Anybody with a --
8 SIPC would stand in the shoes of any customer
9 with a claim of \$500,000 or less. Any customer
10 with, say, a million dollar claim would receive
11 all of that -- all of the property until --
12 well, all of it until -- their ratable share.
13 SIPC only stands in the shoes of those --

14 JUDGE JACOBS: But SIPC would only
15 collect a dollar after the million dollar loss
16 has been replenished to the tune of half a
17 million?

18 MR. LA ROSA: In the case of one
19 customer, yes, correct. If there were one
20 customer. If there's were other customers, yes,
21 SIPC --

22 JUDGE JACOBS: That's all I'm
23 asking.

24 MR. LA ROSA: Yes, that's right.
25 We've said -- there's another

1 reason, of course, why SIPC's subrogation rights
2 are -- or the enforcement of SIPC's subrogation
3 rights against third-party is compatible with
4 the distribution scheme, and that is that SIPC
5 is prevented by statute from interfering with
6 the Trustee.

7 I mean, if SIPC is seeking to
8 recover customer property, SIPC is stayed by the
9 automatic stay from bringing suit. That's a
10 suit that has to be brought by the Trustee. If
11 SIPC somehow were to recover customer property,
12 SIPC would have an obligation under the turnover
13 provisions of the Bankruptcy Code to give it to
14 the Trustee.

15 Either way, the property that's --
16 the customer property that is recovered is going
17 to be distributed through the allocation scheme
18 provided by SIPA and SIPA -- SIPC wouldn't and
19 doesn't have the power to put itself in front of
20 customers.

21 Thank you.

22 MR. SAVARESE: Good morning, Your
23 Honor. My name is John Savarese from Wachtell,
24 Lipton, Rosen & Katz, I'm counsel for Appellee
25 JPMorgan. And consistent with allocation of

1 responsibilities that I outlined at the outset,
2 I'm going to concentrate my time on explaining
3 why this court's precedents concerning trustee
4 standing compel affirmance of both Judge
5 McMahon's decision and Judge Rakoff's decision
6 on standing grounds.

7 In doing so, I'm going to talk
8 about a line of cases that, interestingly, my
9 friends on the other side have not mentioned,
10 and that is the long and unbroken line of
11 decisions begun by the Supreme Court in Caplin
12 in 1972 and then continued thereafter
13 consistently over two decades by this court, in
14 which this court has definitively determined two
15 critical propositions: Number one, that a
16 bankruptcy trustee has no standing generally to
17 sue third parties on behalf of the estate's
18 creditors; and, two, that the Trustee stands in
19 the shoes of the debtor and can, therefore, only
20 maintain those actions that the debtor itself
21 could have brought before the bankruptcy.

22 Now, every single time this court
23 has confronted an argument brought to it by a
24 trustee, saying that the trustee should be
25 permitted to bring claims against third parties,

1 to hold those third parties responsible in part
2 for injuries suffered by the bankrupt
3 corporation's customers or creditors, this court
4 has rejected that argument.

5 And every time --

6 JUDGE JACOBS: Accepting then that
7 a bankruptcy trustee stands in the shoes of the
8 debtor because the fund is the bankrupt estate.
9 I think your adversaries are arguing that the
10 SIPA Trustee stands in the shoes of the customer
11 because what you're looking at is a Fund of
12 Customer Property.

13 MR. SAVARESE: Right. Let me turn
14 to that.

15 The fact that the Trustee is
16 proceeding here under SIPA rather than under the
17 Bankruptcy Code does not mean that the Caplin,
18 Wagoner doctrine, which basically determines
19 trustee standing by asking the question: Who
20 owns the claim? It's a simple straightforward
21 test: Who owns the claim? That test does not
22 go out the window simply because we're here
23 before Your Honors talking about SIPA, and the
24 reason is grounded in the language of the SIPA
25 statute itself.

1 SIPA says -- and I believe Your
2 Honor, Judge Carney, mentioned this -- it
3 plainly states that SIPA Trustees -- and now I'm
4 quoting -- "have the same powers and title with
5 respect to the debtor and the property of the
6 debtor as the Trustee under Title 11," the
7 Bankruptcy Code.

8 It goes on to say that, "to the
9 extent consistent with this chapter, a
10 liquidation proceeding" -- which is what we're
11 talking about -- quote, "shall be conducted in
12 accordance with and as though it were being
13 conducted under Title 11," again, the Bankruptcy
14 Code.

15 So the same rules that this court
16 has developed over many years to refine and
17 define the limits of an ordinary bankruptcy
18 trustee standing, rules that this court has
19 announced and enforced in the whole Wagoner
20 line, must apply to SIPA trustees by the terms
21 of the SIPA statute itself.

22 All -- and coming back now to Your
23 Honor's question -- all that SIPA does
24 differently from the Bankruptcy Code is simply
25 move customers up the priority payment scheme.

1 That's all that's really different.

2 At the end of the day those monies
3 still come out of the debtor estate, and this
4 statute never says a syllable about bailors,
5 bailees, bailment -- you can search high and low
6 in the statute and you will not find those
7 words -- nor does it create -- nor is there any
8 legislative history to suggest that it creates
9 some new juridical entity called a customer
10 property estate that has some new broad, roving
11 commission to bring all these claims.

12 I'm sorry, Your Honor.

13 JUDGE JACOBS: I take it then your
14 argument is is that a bailor is simply someone
15 who moves up in the line? I mean, if your
16 lawnmower is being repaired by a lawnmower
17 company that goes broke, you have a superior
18 claim on your lawnmower.

19 MR. SAVARESE: Precisely. All that
20 the customers get under SIPA is moved up the
21 payment line, that's plainly what the statute
22 said, but that doesn't mean that the definition
23 of customer property, which simply is the cash
24 and the securities held in the broker's
25 accounts, somehow becomes some new juridical

1 entity that has some new power that Congress
2 never gave it to bring lawsuits.

3 JUDGE CARNEY: Isn't it accurate to
4 say, though, that it has some different
5 characteristics in that, you know, membership
6 fees are collected and a fund is created, the
7 SIPC contributes up to half a million dollars
8 per individual account, creating a body that is
9 something greater and different from the regular
10 bankrupt estate?

11 Isn't that right?

12 MR. SAVARESE: I agree, Your Honor,
13 that SIPC is a new entity created by the
14 statute, but I would say again in response that
15 SIPC is a creature of this statute. It,
16 therefore, has to look to and be defined by and
17 be limited by those grants of power that
18 Congress gave it. Those grants are limited,
19 they do not overturn Wagoner, they do not
20 overturn Caplin.

21 JUDGE CARNEY: How do we deal with
22 Redington?

23 MR. SAVARESE: Well, I hate to
24 trample on the toes of my good friend
25 Mr. Schnabl who is --

1 JUDGE CARNEY: I'm sorry --

2 MR. SAVARESE: -- our Redington
3 expert, but I would say two quick things, Your
4 Honor, if you'll permit me.

5 Number one, we believe that
6 Redington is simply not good law, that Judges
7 Rakoff, Judge Pollack and Judge McMahon got that
8 right; and, two, even if somehow Redington still
9 has a pulse, if it's on some legal equivalent of
10 life support, notwithstanding that the Supreme
11 Court reversed and then the panel on remand
12 vacated and the panel on remand determined that
13 there was no jurisdiction and dismissed the case
14 entirely, even if it somehow still survives,
15 there are two independent reasons why it is not
16 controlling here.

17 Number one, Redington's bailment
18 theory was invoked in a case where the trustee
19 had expressly asserted that the Weiss securities
20 brokerage itself was an innocent victim, in
21 other words, a very, very far cry from our case
22 where BMIS was an active participant in, was
23 totally controlled by Bernie Madoff. Those are
24 not my words, those are the Trustee's words.

25 So, importantly, the Redington

1 panel simply never had occasion to consider --
2 and, therefore, never decided -- whether the New
3 York black letter law that Judge Jacobs referred
4 to, the law that says a thief can never be a
5 valid bailee, was not at issue there.

6 Unlike the trustee in Redington,
7 therefore, the Trustee here, who is the
8 successor to a massive thief, Mr. Madoff and his
9 firm BMIS, is not and cannot be under New York
10 law a valid bailee, a wholly independent reason
11 to distinguish Redington.

12 Second reason to distinguish
13 Redington, very briefly, is that simply to the
14 extent it had standing decisions, those standing
15 decisions were solely related to whether the
16 trustee could bring implied causes of action
17 under Section 17 of the '34 Act, when we knew
18 and learned from the Supreme Court that that
19 decision -- that threshold decision by the panel
20 in Redington was erroneous, then those
21 subsidiary standing decisions I think go out the
22 window and have no force here.

23 Let me go next, if I may, to St.
24 Paul because Your Honor asked a good question
25 about St. Paul, and I think you have St. Paul

1 exactly right.

2 The Trustee here seeks to escape
3 from Caplin and Wagoner by arguing that St.
4 Paul, a decision from 1989, somehow created this
5 wholly new concept of generalized injury
6 standing for bankruptcy trustees that is again
7 somehow broader than the defined scope of
8 trustee standing that has been set forth in the
9 Caplin case and the Wagoner case and on. St.
10 Paul simply does no such thing.

11 Indeed, this court said as much in
12 Pereira versus Farace, the decision from 2005.
13 In there this court specifically ruled that St.
14 Paul -- and I'm now quoting -- does not imply
15 that the Trustee's rights are greater than the
16 rights of the debtor corporation. And then it
17 went on to reaffirm its adherence to Caplin and
18 Wagoner cited in Farace, and it concluded that a
19 bankruptcy trustee has no standing generally to
20 sue third parties on behalf of the estate's
21 creditors but may only assert claims held by the
22 bankrupt corporation.

23 JUDGE JACOBS: What is a general
24 claim within the meaning of St. Paul? What is
25 it talking about? It's very difficult to tell.

1 MR. SAVARESE: Right. I think,
2 first of all, it's dictum. The holding of the
3 St. Paul case -- if you go back and examine the
4 case -- the holding is a completely unremarkable
5 holding. All it says is that as a matter of
6 state law, there Ohio law, the alter ego claim
7 belonged to the debtor estate and therefore was
8 perfectly normal for the trustee to be able to
9 pursue it, because, again, you asked that
10 Wagoner question: Who owns the claim? In St.
11 Paul they said the debtor owns the claim,
12 therefore, the Trustee has standing.

13 JUDGE JACOBS: Well, in St. Paul
14 there was some quirk of Ohio law.

15 MR. SAVARESE: I don't know whether
16 it was a quirk or not. I mean, all of the
17 Wagoner cases, Your Honors, say we look to state
18 law. You look at Hirsch, you look at Wagoner,
19 you look at Judge Winter's opinion in Mediators,
20 over and over and over again this court has
21 looked to state law to answer the question who
22 owns the claim.

23 In our case, no question about it,
24 the creditors, the customers of the failed
25 brokerage, BMIS, they own the claim. These are

1 individual direct claims. There's nothing
2 derivative about them. This is an individual
3 injury that each of them suffered, each of them
4 made a decision at a particular time to invest
5 particular amounts of money.

6 If the duties -- the fiduciary duty
7 of the brokerage was owed to them and it was in
8 the end their money that was stolen by Madoff
9 and by BMIS. So there's no question here, and
10 neither Judge Rakoff nor Judge McMahon thought
11 there was any question about the fact that under
12 New York state law the claims we're talking
13 about here, the claims that the Trustee purports
14 to bring, are ones that belong exclusively to
15 the creditor. And in applying Wagoner in its
16 unbroken line of cases, you are led ineluctably
17 to the conclusion that the Trustee cannot bring
18 that kind of claim. He cannot aggregate this
19 mass of individual direct claims belonging to
20 customers in the guise of SIPA and bring this
21 massive case.

22 Those individuals can choose --
23 exactly as the Supreme Court said in Caplin,
24 individuals can choose whether or not they want
25 to bring those kinds of cases and --

1 JUDGE JACOBS: Those cases -- some
2 of them are pending, they're just subject to the
3 automatic stay?

4 MR. SAVARESE: Yes, there's a whole
5 host of cases out there where individuals of
6 various sorts and institutions of various sorts
7 have chosen to bring claims against third
8 parties. No one would say they don't have
9 standing. They, indeed, very consistently with
10 Wagoner, we would agree that they have standing.
11 We passionately think on the merits with respect
12 to JPMorgan that they are wrong about us --

13 JUDGE JACOBS: I'm not surprised.

14 MR. SAVARESE: -- but that question
15 is not before this court.

16 I see that the red light is on. If
17 Your Honors have any other questions for me, I'd
18 be happy to address them.

19 JUDGE JACOBS: Thank you very much.

20 MR. SAVARESE: You're welcome.

21 MR. MOLONEY: Good morning, Your
22 Honors. My name is Tom Moloney and I'm going to
23 be speaking on behalf of the HBSC -- HS -- I
24 guess HSBC defendants -- and, as Mr. Savarese
25 said, I'm going to focus on the statute, though

1 to the extent he already covered some of the
2 statute, I'm going to try to do a deeper dive
3 into some of the provisions I think are
4 specifically going to be helpful to the court in
5 answering some of the questions you've asked so
6 far this morning, but before that I want to make
7 had a couple of big picture points.

8 One big picture point is -- relates
9 to the whole issue of whether the SIPA statute
10 creates a separate customer fund that is not
11 property of the debtor. That is absolutely
12 incorrect. If you look at the statute, the
13 property is still property of the debtor, it's
14 just a priority, or, as the Supreme Court said
15 in Holmes, the claims of creditors are
16 subordinated to that property, and this court
17 has actually ruled precisely -- in a case
18 precisely on point on that issue, in the
19 Rosenman case. In the Rosenman Family case,
20 which was decided by SIPC, this court dealt with
21 the situation where -- involving Madoff where a
22 customer sent money into Madoff ten days before
23 the broker/dealer ended up filing for
24 insolvency, and then he said I want it back,
25 just like they said he could get it back because

1 it's not the debtor's property. And this court
2 said, no, it's the debtor's property, we'll
3 decide later on whether or not you qualify as a
4 customer and have priority. That's a separate
5 issue which the panel said we can't decide now
6 on this record, but that's the debtor's property
7 and that's the way the statute works. So it's
8 the debtor's property.

9 The second big picture point I
10 think is important to make is I think bailment
11 is in many ways a red herring here. The
12 statutes that they're referring to only create a
13 bailment in one limited circumstance.

14 15c3-3 is a rule that allows a
15 broker/dealer to use cash and securities in
16 their business. If you read through the rule,
17 it allows them to pledge it, it allows them to
18 repo it, it allows them to use it in all kinds
19 of activities, to make it available to people
20 who are doing short sales and then they have to
21 put money in an account to make sure that they
22 can get it back or potentially satisfy the
23 customer's claim otherwise. It's a customer
24 protection rule, but it has nothing to do with
25 bailment, it doesn't mention bailment, it

1 doesn't create any rights to bring suits on
2 behalf of the customers.

3 Similarly, the SIPA statute creates
4 only one form of bailment. That's for customer
5 name securities. If you provide a broker/dealer
6 with customer name securities -- I've been a
7 SIPA Trustee in three cases. I've never seen
8 it. I don't think it even happened in Lehman,
9 didn't happen in Madoff, very rarely does
10 someone actually create customer name
11 securities, you can and if you did, then that's
12 a true bailment is established --

13 JUDGE JACOBS: Could you explain
14 that because I'm not sure I follow what that is?

15 MR. MOLONEY: If you actually tell
16 the broker/dealer that the securities could be
17 registered in your name so title is not actually
18 transferred to the broker/dealer --

19 JUDGE JACOBS: So the broker/dealer
20 can't use it for any --

21 MR. MOLONEY: Correct, can't use it
22 for any purpose. Nobody does this. That's the
23 only bailment that the SIPA statute creates.
24 Otherwise, it creates a different scheme. It
25 creates a scheme of priorities and, as Your

1 Honor pointed out, of distributions, and it does
2 not return you necessarily your property. Even
3 in Lehman they did not necessarily return
4 property. If it's unreasonable for the
5 broker/dealer to go out and buy securities
6 because of market disruption, you could return
7 cash rather than property. If there's a margin
8 account and you didn't pay back the margin, you
9 don't get back your property. There's all kinds
10 of rules there. It's a regime of customer
11 protection, but it's not a bailment.

12 In fact, the whole point of these
13 statutes was to move away from the common law
14 bailment. One of the statutes was bailment was
15 difficult because then you had to identify your
16 property, it put limitations on the ability of a
17 broker/dealer to use the property, it gave
18 duties to the broker/dealer or to Mr. Picard,
19 I'm sure he's not carrying out at the moment.

20 This court and the Southern
21 District Court has often said that a trustee is
22 not a substitute broker/dealer. So he's not
23 acting as a bailee. He's acting pursuant to a
24 statutory scheme. So I think those are a couple
25 of big picture points.

1 One other big picture point I would
2 make is about St. Paul. I think the most
3 important thing to understand about St. Paul is
4 in that case what was happening is the
5 corporation itself suffered an injury. It was
6 being deprived of its assets.

7 So if you strip assets away from a
8 corporation, every creditor of the corporation
9 will indirectly suffer harm as a result of the
10 direct harm to the corporation. That's what
11 circumstance St. Paul dealt with.

12 Those are not the claims here. To
13 put it in context and answer a question Your
14 Honor asked, our client, HSBC, did not provide
15 any services to Madoff. We had no duty to
16 Madoff. We provided custodial or administrative
17 services to 12 so-called feeder funds who, you
18 know, they were foreign funds, they're foreign
19 hedge funds, investors invested in those funds
20 and those funds, in turn, made investments into
21 BLMIS.

22 We're being sued all over the world
23 by those funds and by those investors and we're
24 defending those lawsuits, but they're the
25 parties who, if anyone was injured by our

1 failure to carry out our duties as administrator
2 or as a custodian, were directly injured by that
3 injury. And the Trustee who's sitting here, he
4 has suffered no direct injury whatsoever as a
5 result of what we did. We provided him with
6 just more money into his estate.

7 JUDGE JACOBS: Well, hypothetically
8 assume you have a bank that did violate the law,
9 that was hand in glove with the Ponzi schemer, a
10 big bank, how would SIPC get its money back from
11 such an entity, either by subrogation or by
12 suit, or whatever, or does it have to just wait
13 until the customer hits the jackpot, collects
14 every dime and dollar, and then take its money
15 from that judgment?

16 MR. MOLONEY: I think there's
17 really three answers to that, Your Honor, in
18 this case.

19 JUDGE JACOBS: One will do.

20 MR. MOLONEY: The three answers to
21 that in that case is -- the first answer is that
22 in our case the customers -- the investors, the
23 foreign investors, are not customers so SIPC is
24 not paying them.

25 The 12 feeder funds, they're suing

1 11 of them, so SIPC is not paying them either.
2 So SIPC is not advancing funds for these people.
3 The money for whom SIPC is --

4 JUDGE JACOBS: But my hypothetical
5 dealt with --

6 MR. MOLONEY: In a hypothetical
7 situation -- in a different situation where they
8 -- so I'm just talking about in our case, the
9 case involving HSBC --

10 JUDGE JACOBS: But you're talking
11 also generally about the SIPA scheme?

12 MR. MOLONEY: In the bigger scheme
13 of things, SIPC's rights are specifically
14 defined as a subrogation right to the net equity
15 claim against the broker/dealer. Those claims
16 -- that money will come out only after all other
17 net equity claims have been satisfied.

18 Additionally, to the extent SIPC
19 pays the administrative costs of the estate and
20 pays the fees of the lawyers involved, that
21 money will come out ahead of all unsecured
22 creditors as to an administrative claim and
23 anything that's left over.

24 That's what the statute provides,
25 for SIPC to get the money back that is provided

1 in advancing of the scheme. It does not -- to
2 the extent SIPC has some additional independent
3 claim, but not a subrogation claim, it can bring
4 that claim against parties, it's tried to do
5 that --

6 JUDGE JACOBS: It's not a -- it
7 kind of looks like it would be a subrogation
8 claim, doesn't it?

9 MR. MOLONEY: Yes.

10 JUDGE JACOBS: I mean, you make
11 good someone's loss to the tune of half a
12 million dollars and then -- and if there's a
13 person who's committed wrongdoing who is
14 sufficiently deep pocket to pay it, why can't
15 SIPC replenish its funds and repay the taxpayer?

16 MR. MOLONEY: I think Holmes dealt
17 with this in part, Your Honor, in saying that to
18 try to imply an additional equitable subrogation
19 right to SIPC raises a lot of unanswered
20 questions, and I'll just mention a few of the
21 them here.

22 One thing before I do is, they were
23 not correct in saying there's no legislative
24 history on point. Legislative history is cited
25 in JPMorgan brief at Page 51 which indicated,

1 the claims of SIPC as subrogee, except as
2 otherwise provided, should be allowable only as
3 claims against the general estate. That was a
4 SIPC task force before the statute was enacted.
5 So they understood that they were getting a
6 limited right.

7 I think the legislation is clear,
8 as pointed out in the opinions, but the
9 legislative history is also clear that they
10 understood they were getting a limited right.
11 But if you want to posit that they have this
12 additional right beyond what the statute
13 provides, then you have to ask the first
14 question is: Who are they subrogated to? The
15 person who was the -- who took out the insurance
16 was BLMIS, the person who actually pays the
17 claims is BLMIS.

18 So if they're subrogated claims of
19 BLMIS against other parties, they're going to be
20 standing in the same in pari delicto defense
21 that we have against BLMIS.

22 The second question --

23 JUDGE CARNEY: I'm sorry, when you
24 say who took out the insurance, you mean who
25 participated as broker/dealer in creating the

1 fund that SIPC --

2 MR. MOLONEY: Well, broker/dealers
3 created the fund and they created the insurance
4 for the broker/dealer, BLMIS. SIPC doesn't
5 actually pay any claims. All they do is advance
6 money to this broker/dealer so that it pays a
7 portion of a net equity, not the real claim.

8 So you got a situation as to do
9 they actually have a claim against somebody else
10 other than BLMIS. Then of course, Your Honor,
11 you have the New York State's rule about make
12 whole which is that for this other claim they
13 would also have to wait until these funds and
14 these investors actually were made whole before
15 they could actually bring a claim under New York
16 equitable subrogation law, if that's what they
17 were relying on.

18 You know, whether or not they're
19 relying on New York -- Holmes said that, look,
20 we can't start figuring this out. The statute
21 gave them a specific right. They had not
22 articulated a theory that gets them a broader
23 right.

24 If you look at the facts of this
25 case, I don't -- they don't have -- the people

1 they've been subrogated to never heard of HSBC,
2 many of them may have invested before HSBC even
3 was involved in the case, in terms of talking
4 about reliance. You'd have to bring a claim on
5 behalf of 2000 people, each one would have a
6 different story against someone who didn't have
7 any dealing with them.

8 By comparison, the funds who are
9 suing us and the investors who are suing us
10 directly, you know, for the same \$9 billion --
11 they're all three groups are suing us for the
12 same \$9 billion. And the Wagoner rule kind of
13 allocates who has standing and says that, look,
14 between these three groups the person who has
15 standing is the person who was directly injured.

16 Your Honor, I think that's the rule
17 that has to apply here.

18 JUDGE JACOBS: Is there a reliance
19 element to any of the claims that are being
20 asserted against your client?

21 MR. MOLONEY: Of course there's a
22 reliance element, Your Honor. You know, the
23 aiding and abetting fraud. What fraud did we
24 aid and abet and how did we aid and abet the
25 fraud? Someone who invested five years before

1 HSBC was even involved in any way in this
2 scheme, how could they say we aided and abetted
3 a fraud as to them? How did we aid and abet any
4 misrepresentation that was made to them at that
5 point in time?

6 So I think that someone who's never
7 heard of HSBC, who did not come through one of
8 these 12 feeder funds, how could they say that
9 we somehow aided and -- that they relied on our
10 involvement in any way or that we aided and
11 abetted any statement that they relied on by
12 Bernie Madoff?

13 So I think reliance -- I think Your
14 Honor is dead on that reliance is exactly on
15 point and it's why -- it's why -- it's what
16 animated Wagoner's decision, as Your Honor is
17 aware.

18 In Wagoner they said that, look,
19 the company couldn't rely on the false reports
20 of the accountants, the company produced the
21 phony books. That's the case here. They
22 produced the phony books standing in the shoes
23 of the debtor, which is what they stand in the
24 shoes of for purposes of bringing these type of
25 claims.

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1 JUDGE CARNEY: One quick question
2 before you sit down, if I may.

3 MR. MOLONEY: Yes.

4 JUDGE CARNEY: Is the fund that
5 SIPC draws on to pay harmed customers, is there
6 any taxpayer money in that or is that all
7 broker/dealer membership fees?

8 MR. MOLONEY: It's all
9 broker/dealer membership fees, Your Honor, which
10 they raised and then they stopped when they
11 thought they had a billion dollars and it was
12 enough, and then they had Lehman and they had
13 Madoff and now they're raising those fees again
14 over -- but all broker/dealers pay a fee --

15 JUDGE JACOBS: The government is
16 never on the hook for this?

17 MR. MOLONEY: The government is
18 never on hook. There's a provision that says
19 that the government can make --

20 JUDGE JACOB: Even after the money
21 is used up?

22 MR. MOLONEY: Yeah, there's a
23 provision that says the government can loan to
24 SIPC of up to a certain amount of money. And
25 that's -- I think it's up to \$300 million

1 dollars, last time I remember looking at the
2 statute, but they have to pay it back.

3 So the government is not paying
4 this money. It's the broker/dealer community is
5 paying the money.

6 JUDGE JACOBS: Thank you.

7 MR. MOLONEY: Thank you, Your
8 Honor.

9 MR. SCHNABL: Good morning, Judges.
10 My name is Marco Schnabl. I'm with the Skadden,
11 Arps firm and I owe Mr. Savarese a commission
12 for having addressed some of the subjects.

13 I will briefly rise simply to urge
14 the Court to leave a case, Redington against
15 Touche Ross, where it is, as we said, deader
16 than a doornail. It is a case that was reversed
17 by the Supreme Court, it was vacated by this
18 court and then dismissed by this court and I
19 need to go --

20 JUDGE JACOBS: And you don't think
21 it's persuasive?

22 MR. SCHNABL: I will get to that.
23 It is neither binding nor is it persuasive.

24 JUDGE CARNEY: Just one second.
25 You said it was vacated by the Supreme Court, it

1 was, but it made -- there were holdings that
2 were not addressed by the Supreme Court. Isn't
3 that correct?

4 MR. SCHNABL: I may have misspoken
5 or not said it correctly. It was vacated by
6 this court, not the Supreme Court. It was
7 reversed by the Supreme Court and then it was
8 vacated by this court in its entirety, and then
9 it was dismissed for lack of subject matter
10 jurisdiction at the end of the process, and let
11 me go through it so this is placed in context.

12 In Redington -- by the way, it is
13 worthwhile observing that this 35-year-old case
14 is being resuscitated every time by SIPC and
15 Trustee when they want to ask for courts for
16 these implicit rights that they've had 35 years
17 to ask from Congress and that have never gotten.

18 That is an interesting observation
19 because counsel for SIPC said that a certain
20 provision codified what -- in the '78 amendment
21 codified what Redington said. It must have been
22 a very insightful codification because the
23 legislative history long precedes -- that says
24 that it was a technical amendment -- long
25 precedes the opinion in Redington.

1 In any event, in Redington three
2 giants of this court: Judges Lombard, Judge
3 Timbers and Judge Mulligan, engaged in the kind
4 of debate that made them the giants they were.

5 And in that case this court held
6 that there was a private right of action under
7 17(a) on behalf customers of the failed broker
8 to sue an accountant that was in direct privity
9 with that broker.

10 Having invented a cause of action
11 that the Supreme Court later told us did not
12 exist, they had to invent a plaintiff, and the
13 plaintiff they invented was the Trustee as
14 bailee of customer property and SIPC as an
15 equitable, equitable subrogee to bring to assert
16 these claims.

17 The Supreme Court takes the case
18 and reverses on the threshold issue of the
19 existence of a right of action under 17(a).
20 Those were the heady days of '78 when private
21 right of actions existed behind every word and
22 every statute. The Supreme Court says there is
23 no private right of action. It comes back to
24 this court and then judge -- the three panels,
25 three panel, not a clerk, not a single judge,

1 the three judge panel vacates the entire
2 judgment.

3 The litigation continues for a
4 period -- to the end of '79 because there is a
5 parallel state proceeding in which these common
6 law claims -- common law claims against the
7 accountant are being brought and trustee and
8 SIPC wanted to be in federal court. They say
9 there must be some form of jurisdiction to bring
10 these cases here, some plenary jurisdiction, and
11 the court finally, the same panel in what we
12 have called Redington 3 at 612 F.2d 68, says,
13 no, absent 17(a) there is no subject matter
14 jurisdiction in this court and affirms Judge
15 Wyatt's original dismissal of the case.

16 And let me observe that when Judge
17 Lombard writes the opinion saying there is no
18 subject matter jurisdiction, he characterizes
19 the Supreme Court as having reversed the
20 decision to allow the trustee to maintain a
21 private right of action. He goes well beyond
22 saying it has reversed the existence of 17(a).

23 Now, is this a binding decision, is
24 this a decision to which this tribunal has a
25 stare decisis obligation? I suggest it is not

1 for any of the following three reasons, let
2 alone all of them collectively.

3 It is vacated and we've offered
4 case law for the proposition that a vacated
5 opinion absolutely has no precedential value.
6 The court -- this court found that it had no
7 subject matter jurisdiction and, therefore, on
8 an elemental understanding of that conclusion,
9 we know that it had no power to speak on the
10 matter, and, therefore, what it did say really
11 is a nullity.

12 Number three, the -- all the
13 rulings are stripped of precedential value by
14 the fact that the Supreme Court reversed on what
15 is a threshold issue, the existence of the cause
16 of action, and we have offered cases like
17 Newdow, Picard against JPMorgan, LaBarbrea,
18 Gutierrez all in our submissions that document
19 why these three reasons, independently and
20 collectively, strip the case of precedential
21 value.

22 The question then is: Is it a
23 persuasive case? And let me suggest the reasons
24 my distinguished colleagues have said, it simply
25 isn't persuasive --

1 JUDGE CARNEY: Excuse me, before
2 you get to persuasiveness, I noted that in the
3 BDO Seidman litigation in the year 2000, we
4 discussed Redington at some length, and I wonder
5 if you could address the meaning of that,
6 please.

7 MR. SCHNABL: Absolutely. I'm
8 jumping ahead because that's a question I was
9 going to observe, that in the sphere of cases to
10 which this court might arguably have some stare
11 decisis observation, I know of only two. BDO
12 Seidman is one and it was written, as I
13 remember, by now Justice Sotomayor. And the one
14 thing that is clear is that this court didn't
15 endorse Redington, it simply assumed Redington
16 to be the law, and then proceeded to dismiss on
17 12(b)(6) basis.

18 It did not offer an opinion, as I
19 read the case, as to the accuracy, the
20 controlling power or the persuasiveness. It
21 didn't have to. It dismissed on 12(b)(6) basis
22 and the issue really wasn't decided.

23 Then there was Holmes, Your Honor.
24 Coming from the Supreme Court it is sometimes
25 regrettably binding on this court, and it is

1 touted as having endorsed Redington.

2 In fact, it did no such thing. Not
3 only did it say that the SIPC subrogation theory
4 is fraught with all manner of unanswered
5 questions and then went on to decide this RICO
6 case on proximate cause, it specifically said in
7 footnote 17 "we express no opinion."

8 Now, in English that means we
9 express no opinion about Redington. It simply
10 observed the existence of Redington and
11 expressed no opinion.

12 So as far as I'm concerned, I am
13 not aware of any case to which this court owes
14 some form of stare decisis respect that has ever
15 endorsed Redington, wholly apart from its lack
16 of binding value.

17 So it requires me to say: Why
18 isn't it persuasive? Well, I'm tempted to start
19 with what is dangerous because you, Judge
20 Jacobs, ask how does SIPC get its money back.

21 Well, that is -- betrays a
22 temptation of statutory improvement that the
23 Supreme Court said in Redington one ought not to
24 engage in.

25 JUDGE JACOBS: Well, we do our

1 best.

2 MR. SCHNABL: I understand.

3 As Mr. Moloney discussed, this
4 isn't the government's money. This comes from
5 the industry. It's just not there in the
6 statute. What the statute provides is what
7 Mr. Moloney discussed, subrogation rights
8 against the estate.

9 So let me observe that it is not
10 persuasive, even in those aspects which deal
11 with standing, because it really, in adopting
12 both of these conclusions, suffered from the
13 same vice that the Supreme Court said it had
14 suffered in 17(a). And we can see it because,
15 frankly, Judge Mulligan was declared to be
16 right, I knew him to be right, as the Supreme
17 Court said, and then he became a partner at
18 Skadden, so he's doubly right.

19 Another reason, let me say, there
20 is no room, as Mr. Savarese said, to extend it,
21 to extend Redington, even if it were a good law
22 to the entirely particularized world of these
23 multitudinous claims when, in fact, the narrow
24 holding in Redington is that there is standing
25 with respect to a direct claim of a regulatory

1 nature against someone with privity.

2 None of these have privity. We are
3 a parent of some investment advisor somewhere in
4 Europe. The multitudinous difficulties of
5 extending the Redington decision to this context
6 were recognized by Judge Rakoff.

7 The bailment theory, we have talked
8 about the bailment until we are blue in the
9 face. There is no real bailment. There is a
10 discussion about bailment. 15c3-3 doesn't speak
11 about bailment. There isn't any bailment here.
12 They're trying to sue third parties and return
13 it according to SIPA's structure. There is no
14 return of property to particular customers that
15 can be identified as their property. Even if it
16 is fungible, it is going to be distributed under
17 the SIPA structure.

18 The entire construct of this
19 equitable subrogation clashes with the very
20 structure the '78 amendment put in place, as
21 Judge Rakoff determined, because it is
22 inconsistent with the priority that puts SIPA
23 below the customers.

24 As my time is over, I will also
25 call to Your Honors' attention, because we have

1 discussed it before, and given the way we're
2 doing this, there is a temptation to improve on
3 my colleagues -- I call to Your Honors'
4 attention 78111 for the definition of customer
5 property because it is a good habit actually to
6 read the statute.

7 It says it's cash and securities,
8 and then goes through each of these categories:
9 Securities, resources, cash, and the catchall at
10 the end says, "and any other property of the
11 debtor which, upon compliance with applicable
12 laws, would have been set aside or held for the
13 benefit of customers."

14 I am not aware that when I put a
15 hundred dollars at a broker, I'm also depositing
16 my claims against third parties, because if that
17 is the case, somebody better tell me that, and
18 it's not in the statute.

19 The notion that customer property
20 -- leaving aside the fiction that there is a
21 separate Fund of Customer Property -- that
22 customer property entitles the Trustee to sue
23 third parties is nowhere in the statute and it's
24 nowhere starting with the definition of customer
25 property.

1 Thank you.

2 MR. KING: May it please the Court,
3 Marshall King from Gibson Dunn & Crutcher on
4 behalf of the UBS defendants.

5 My plan is to discuss the issues of
6 contribution which the Trustee has raised, and
7 if time permits or if Your Honors have any
8 questions, the alternative ground for affirmance
9 of SLUSA preclusion that we have argued here.

10 On contribution there are really
11 three key points that I want to make: One is
12 that there is no dispute among the parties that
13 there is no right of contribution under SIPA or
14 under federal common law for the claims at issue
15 here.

16 The Trustee -- Judges McMahon and
17 Rakoff both held that there was no such federal
18 right of contribution. The Trustee does not
19 argue otherwise here. In fact, he runs away
20 from federal law arguing that New York law is
21 the source of his contribution claim, which
22 brings me to my second point, of course, which
23 is that state law here doesn't apply because the
24 underlying obligation for which the Trustee
25 seeks contribution is an obligation imposed by

1 federal law.

2 The Supreme Court held in Northwest
3 Airlines that where state law supplies the
4 appropriate rule of decision, the court can look
5 to state law for contribution rights and see if
6 the state law implies those rights on behalf of
7 a party that pays out more than its fair share,
8 but the way the Supreme Court and this court
9 have analyzed and assessed what supplies the
10 rule of decision is by looking to the source of
11 the underlying obligation for which the claimant
12 is liable.

13 In Northwest Airlines the issue was
14 a claim against the defendant under the Equal
15 Pay Act and under Title VII and the court
16 rightly said that, therefore, is a matter of
17 federal law whether that defendant has a
18 contribution claim against third parties who
19 allegedly contributed to the injury. They held,
20 of course, that it did not have a contribution
21 right in that circumstance, but it does not
22 endorse state law contribution in that
23 circumstance.

24 In this court, in Herman versus RSR
25 Security Services, the court applied Northwest

1 Airlines in a very similar manner. The
2 defendant there was liable for violations of the
3 Fair Labor Standards Act. The court first held
4 that the FLSA did not give a right of
5 contribution under federal -- either implied by
6 law in the statute or under federal common law
7 and it rejected the argument that the defendant
8 made that he should have a state law
9 contribution right.

10 It said, and I'm quoting, "here
11 federal law, not state law, supplies the
12 appropriate rule of decision because the instant
13 claim has been brought solely pursuant to the
14 FLSA."

15 In addition to Judges McMahon and
16 Rakoff below and the decisions that are on
17 appeal here, other judges in the district courts
18 have applied and followed a similar analysis. I
19 think Judge Mukasey's decision in LNC is a very
20 good expression of the issue and holds -- again,
21 I'm quoting -- "the source of a right of
22 contribution must be an obligation imposed by
23 state law. If the underlying obligation is one
24 imposed by federal law, the contours of that
25 obligation also are determined by federal law."

1 In applying this rule in LNC, Judge
2 Mukasey found first that there was no right of
3 contribution under the Trust Indenture Act.
4 There was a claim against the defendant under
5 the TIA that Judge Mukasey said you cannot seek
6 contribution for that.

7 What he then went on to hold,
8 though, is there was also a claim for state law
9 breach of fiduciary duty against the defendant
10 there, and he said for that claim you can assert
11 a state law contribution claim.

12 So that's exactly what we have here
13 -- that distinction is one that applies here,
14 and that is that the obligation that the Trustee
15 is required to pay here is an obligation imposed
16 by federal law, by SIPA under the net equity
17 obligations of the statute.

18 It's irrelevant -- the Trustee
19 says, well, I've got these -- I've claims -- my
20 state law aims are aiding and abetting claims.
21 My state law claims arise under New York law.
22 It's irrelevant that that's what the claimants
23 might have against us.

24 What matters is what is the claim
25 against the Trustee. The claim for which that

1 -- the Trustee seeks to have us contribute to,
2 and that is what supplies the applicable rule of
3 decision, and here that is only federal law and
4 not state law and, therefore, state law simply
5 has no application here.

6 Finally, my third point on
7 contribution. Even if you could get to the idea
8 that New York state law would apply, the New
9 York state law requires that the parties seeking
10 contribution be liable for damages, that's what
11 the statute says, liable for damages for the
12 same injury to property. That's CPLR 1401.

13 The Trustee's obligation here to
14 distribute customer property to customers of
15 Bernard Madoff in accordance with net equity
16 claims is not liability for damages. It's not
17 tort liability at all. Net equity is a
18 mathematical formula. There are different ways
19 one can apply it, as Your Honor held last year
20 in the Net Equity decision, but it's a
21 mathematical formula that does not require
22 anyone, no customer is required to prove tort
23 liability against the Madoff brokerage firm.

24 And Your Honor, in fact, in that
25 decision made clear that we aren't talking about

1 -- SIPA does not protect against fraud. That is
2 not what SIPA is designed to do. SIPA is
3 designed to distribute money equitably when a
4 broker/dealer goes insolvent. It is not a fraud
5 statute.

6 And, therefore, the claims against
7 the estate, the claims against the customer
8 property fund are not tort claims. They are
9 simply a statutory mathematical calculation.

10 JUDGE JACOBS: It doesn't matter
11 why this property vanished?

12 MR. KING: It does not matter why
13 property vanished. And here, of course, there
14 is no finding that any one person, any customer
15 has a fraud claim or is recovering on a fraud
16 claim.

17 There's an interesting application
18 of this. It's in an older case called In Re MV
19 Securities that we cited in our papers. It's a
20 bankruptcy court decision from 1985. There a
21 customer of a broker/dealer brought and won an
22 arbitration claim against the broker/dealer
23 before the SIPC -- the SIPA insolvency
24 proceeding started. They won an arbitration
25 claim on the ground that the investment that was

1 made on behalf of the customer was unsuitable
2 for that particular investor.

3 The court, however, held that that
4 claim, that arbitration award was not a customer
5 claim, it was not protected as part of what SIPA
6 is designed to protect and, therefore, that
7 person didn't have a customer claim.

8 Had the broker/dealer been holding
9 securities on her behalf, she would have had a
10 customer claim, but that's not what was at
11 issue.

12 What was at issue was, similar to
13 here, a fraud claim, a wrongful acting claim
14 that customers might have. What Judge Abram in
15 the bankruptcy court said, "SIPA does not
16 protect customer claims based on fraud or breach
17 of contract. SIPA's primary intent and policy
18 are to protect customers who have cash and
19 securities being held for them by a
20 broker/dealer, rather than to serve as a vehicle
21 for the litigation of claims of fraud or
22 violations of Rule 10b-5."

23 So whether you look at this as a
24 matter of not having a claim under federal law,
25 if you could get to the issue of state law, you

1 still wouldn't have a right of contribution in
2 the debtor here because they aren't paying tort
3 liability, they aren't payable damages to
4 customers.

5 Briefly, I want to just touch on
6 this alternative ground for affirmance that
7 everyone argued below was not addressed by
8 either Judges McMahon or Rakoff but which does
9 provide a ground for affirmance if the Court
10 ever needs to reach it and that's SLUSA
11 preemption, and I'll be brief on that.

12 There are really two issues that
13 are in dispute: One is, frankly, rather simple,
14 I think. It's a question of whether the fraud
15 is in connection with the purchase or sale of a
16 covered security. The "in connection with"
17 requirement the Supreme Court in Dabit says is
18 to be broadly construed, that this court in
19 Romano said that that's satisfied if the claims
20 necessarily allege, necessarily involve, or rest
21 on the purchase or sale of securities. And
22 nearly every single case at the District Court
23 level that's looked at the Madoff case, the
24 Madoff fraud, has held that it is in connection
25 with the purchase or sale of securities.

1 There is one outlier case called
2 Anwar. It's probably wrongly decided, in light
3 of the overwhelming authority to the contrary,
4 but even there the reason that Judge Marrero
5 held that it wasn't in connection with the
6 Madoff fraud was because there were claims by
7 investors in feeder funds which then invested in
8 Madoff. And he held that there was a separation
9 between the fraud that was alleged to have
10 defrauded these folks to invest in the feeder
11 fund and from the covered securities that Madoff
12 was supposed to be buying. Here none of that,
13 of course, is present. The claims he's bringing
14 are on behalf of customers directly.

15 The more interesting question is
16 whether this is a covered class action. And
17 here we do think that it is because these claims
18 are literally being brought on behalf of
19 customers. It is not just that customers will
20 benefit by a recovery to the estate. These are
21 being brought on behalf of those customers.

22 The counting provision of SLUSA,
23 which the Trustee and SIPC rely on, simply
24 aren't relevant. The Trustee may well be one
25 person, but the claims he's bringing are on

1 behalf of more than 50 -- more than 50
2 customers.

3 The Trustee calls the counting
4 provision, he calls it an entity exception or an
5 entity exemption, and there is some case law
6 that uses that term, but the statute doesn't say
7 it's an exception, the statute doesn't call it
8 an exemption. The statute says this is how you
9 count people. And if you're a corporation or a
10 trustee and you aren't organized solely for the
11 purpose of bringing the claim -- or for the
12 purpose of bringing the claim -- it doesn't have
13 to be solely -- you are one person, but if you
14 are bringing the claims on behalf of more than
15 50, it's a covered class action, just as any
16 class plaintiff, any named class representative
17 is one person, but if they bring a class action
18 on behalf of more than 50, then SLUSA applies
19 and precludes the claims.

20 JUDGE JACOBS: Thank you.

21 MR. KING: Thank you, Your Honor.

22 JUDGE JACOBS: Welcome.

23 MR. VELIE: Good afternoon, Your
24 Honor.

25 I'm Frank Velie, may it please the

1 Court, from Sullivan & Worcester. I represent
2 UniCredit Bank Austria in Docket 5175. And I'm
3 here to argue for another alternative holding
4 for why the case was properly dismissed, and
5 that is the Trustee lacks Article 3 standing.

6 This argument applies not just to
7 Bank Austria but to UniCredit S.p.A. and
8 Pioneer, our co-defendants in 5175, the HSBC
9 defendants in 5207, and the UBS defendants in
10 5051.

11 To set the stage. What is it that
12 we are alleged to have done? We are alleged --
13 these moving defendants are alleged -- I should
14 say these Appellee defendants are alleged to
15 have provided services to certain foreign feeder
16 funds, and that in that connection, we missed
17 the significance of certain red flags which are
18 alleged, and the result of that was that foreign
19 investors put their money into the feeder funds
20 and the feeder funds in turn put their money
21 into Madoff.

22 Now, as you might imagine, this has
23 created a number of disputes between the
24 investors into the foreign feeder funds and us.
25 We are being sued not only here where there was

1 a class action which was recently dismissed on
2 forum nonconvenience grounds, but there are
3 numerous, numerous actions against these
4 defendants all over Europe and elsewhere, and
5 those actions have not been stayed. We are
6 defending those actions.

7 The Trustee is a stranger to this
8 dispute. How is it that we are being sued here?
9 He claims, well, when we did this and this
10 resulted in money being invested in the feeder
11 funds, there was an influx of cash into BLMIS.
12 Well, how does that injure BLMIS? It's hard to
13 see if Judge Rakoff couldn't see how that
14 created an injury. And if you look at their tag
15 word, which is deepening insolvency, that
16 provides no help either. If you take a look at
17 the cases collected -- quite nicely, I thought,
18 about Judge Kaplan in the Refco case -- where
19 you have money going into a person that might be
20 insolvent, it creates a debit and a credit, an
21 asset and a liability. They're in perfect
22 balance. That doesn't deepen the insolvency.

23 What deepened the insolvency? The
24 subsequent act of Mr. Madoff who misapplied and
25 misappropriated the money. He's a third -- he's

1 a foreigner to this dispute between us and -- if
2 there is a dispute -- between us and these
3 feeder fund people.

4 And, of course, there's harm to the
5 customers, Mr. Madoff's customers, but that harm
6 was caused solely by Mr. Madoff. We put the
7 money in and if Mr. Madoff had not subsequently,
8 as I say, misapplied or misappropriated, it
9 would still be there along with their money.

10 JUDGE JACOBS: Your standing
11 argument is starting to merge with the merits.

12 MR. VELIE: Indeed that can happen.
13 There is a lot of causation which is baked into
14 standing. The rule, accurately stated, I
15 think -- or at least for our purposes -- is --
16 the rule we need to follow is the one that's
17 articulated or at least endorsed by this court
18 in the St. Pierre case in 2000, and that is the
19 plaintiff must show harm to himself, fairly
20 traceable to the acts of the defendants, which
21 are complained of, and which is not the result
22 of an independent act of a third-party or here a
23 first party, Mr. Madoff.

24 So, inevitably, there's going to be
25 overlap between causation for whatever purposes

1 causation is used and for standing, but here
2 where there is no injury whatever and the
3 dispute is one -- if there is one -- about what
4 we did and whether it was right or wrong is
5 really a dispute between us and investors in the
6 feeder funds. The Trustee is a stranger to
7 this, and for that reason we argue lacks
8 standing.

9 That's basically the argument I
10 want to make and it goes this way. If there's
11 no injury, there's no standing. If there's no
12 standing, there's no case or controversy, and,
13 therefore, no subject matter jurisdiction in
14 this court.

15 So this is an alternative ground
16 applicable to these defendants.

17 JUDGE JACOBS: Thank you.

18 Any rebuttal?

19 MR. WARSHAVSKY: A lot. Thank you.

20 I want to start by discussing
21 Redington and maybe just -- well, actually I'll
22 start by -- Redington is the law of this
23 circuit. A district judge is not allowed to
24 overturn the law of this circuit. Ultimately
25 when the defendants say, a-ha, it was vacated,

1 the first time the argument that Redington was
2 vacated was ever made was to this court, and it
3 was by virtue of a copy of an order which we
4 cannot find in the file.

5 We first saw this when we got the
6 defendants' briefs. It wasn't argued below, it
7 wasn't argued in BDO. Everybody until these
8 briefs were filed in this case understood
9 Redington to be the law of this circuit, and
10 that includes this court.

11 In the BDO case -- and we cite to
12 it -- it's very clear. Now Justice Sotomayor
13 said Redington is the law of this circuit. Even
14 if --

15 JUDGE JACOBS: Well, that was
16 assumed.

17 MR. WARSHAVSKY: I'm sorry?

18 JUDGE JACOBS: I think she assumed
19 it to be in that case.

20 MR. WARSHAVSKY: Well, that's
21 right, but what else would she -- I guess the
22 question is, Your Honor, what else would she
23 look to?

24 JUDGE JACOBS: It's odd to say of a
25 current case that it's assumed to be the law of

1 the circuit if it's the law of the circuit.

2 There's a controversy about it, I mean, it's
3 impaired, it's -- it has dubious aspects to it
4 at this stage.

5 MR. WARSHAVSKY: Well, I guess the
6 first point I was speaking to is that it was
7 always understood to be the law of the circuit
8 and whether or not it was questioned -- even BDO
9 said it could only be reversed by the Supreme
10 Court or by a full -- by a panel of this court,
11 and that's how it was understood. We've argued
12 to you why we think it is good law, nonetheless,
13 but I did want to start there.

14 I want to address then
15 Mr. Savarese's argument about SIPA being only a
16 payment scheme and the Fund of Customer Property
17 only being a payment scheme. What I would point
18 to is the statute itself in 78fff-2(c)(1). And
19 that is the provision of what happens when the
20 Fund of Customer Property is not replenished but
21 there's money in the general estate. And what
22 the statute says is that at that point a
23 customer claim -- the customer's net equity
24 claim is treated just like a general creditor.

25 If SIPA is only a priority scheme,

1 why would a customer's net equity claim be
2 treated similar to all the claims of a creditor?
3 If in this case no money could be brought back
4 into the estate -- let's remember, in this case,
5 when this case first broke, people weren't
6 expecting the Trustee to be able to bring as
7 much money -- very much money back in at all,
8 and it's questionable whether the Trustee will
9 be able to bring all the money back in, but if
10 Madoff was running another business, if there
11 was another general estate, all these customers
12 would participate just like general creditors.
13 The reason again, I would submit to Your Honors,
14 goes back to the definition of customer
15 property. What is customer property? It's
16 property that never belonged to the debtor.

17 Redington -- we say in our papers
18 that Redington is a judicial expression of the
19 law, because, as you point out, the statute
20 doesn't say bailment, but a broker/dealer and a
21 SIPA Trustee and the debtor don't have an
22 ownership interest in customer property, they
23 never did. All any of those entities have is a
24 right of possession and they own it -- I'm sorry
25 -- and the property itself is always owned by

1 the customers, but, again, it's -- the Fund of
2 Customer Property is far more than a payment
3 scheme.

4 I'd also -- Wagoner was touched
5 upon, but I'd also like to discuss why Wagoner
6 would be inappropriate in the context of a
7 bailment like this. And it's not an overarching
8 policy and it actually goes to the definition of
9 customer property and the definition of
10 customer.

11 The Kirschner case, the New York
12 Court of Appeals was very clear. It said, look,
13 there could always be good policy ground, people
14 could always argue policy for why one set of
15 creditors should profit over another set of
16 creditors. We don't have that here.

17 Again, we go to the definition of
18 customer. The definition of customer excludes
19 creditors, it excludes shareholders and it goes
20 a step further. It excludes anybody who's a
21 capital investor even if they're clean, even if
22 there was no fraud here, even if Wagoner never
23 claim into play, none of those entities could
24 ever recover from the Fund of Customer Property.

25 That's why I think Wagoner and in

1 pari delicto should never apply to the Fund of
2 Customer Property or Trustee seeking to recover
3 money for the Fund of Customer Property.

4 JUDGE CARNEY: Could you also
5 address your adversaries' argument about the
6 definition of customer property that's in the
7 statute that, as I understood he was saying, it
8 didn't include choses in action, it's just
9 securities or cash, therefore, that you don't
10 have control over their claims?

11 MR. WARSHAVSKY: Well, customer
12 property is -- the definition is whatever was
13 supposed to be segregated and anything that
14 actually was segregated. It includes anything
15 that the debtor wrongfully converted and put
16 into the debtor's property. It also includes
17 anything that the Trustee can bring back into
18 the estate.

19 So customer property always
20 includes, for instance, the avoidance actions of
21 the Trustee. If the Trustee sees that money --
22 that one customer's money has gone to a second
23 customer, the Trustee can always bring an
24 avoidance action to try and bring that money
25 back into the estate. If the Trustee wins the

1 case, wins the avoidance action, that money
2 that's brought back in doesn't go to the general
3 estate, it goes to the customer property fund.
4 So that's the definition of customer property.

5 My adversary is right, there is no
6 definition -- there's nothing in the definition
7 of customer property that says, a-ha, any
8 third-party claim could be brought, obviously,
9 but it does bring in any property of the debtor,
10 and to the extent a debtor has a third-party
11 claim, certainly that would be included as
12 property of the debtor which could be brought
13 back into the estate.

14 In that regard, I guess as long as
15 we're talking about third-party claims, I'm
16 going to skip to Mr. King's argument. Mr. King
17 said, well, SIPA doesn't allow for state law
18 claims. No one here has ever debated that the
19 Trustee has a right to bring causes of action
20 under the New York Debtor Creditor Law, no one
21 has ever questioned that.

22 In point of fact, if Madoff had had
23 innocent insiders, no one would have questioned
24 whether or not he could -- there might be
25 exceptions to in pari delicto to bring actions

1 under the Bankruptcy Code because he invested
2 with those powers.

3 What we've done here is we've said
4 any defense that exists under Chapter 11 is
5 going to be imported into SIPA. That's
6 really what is -- SIPA statute doesn't speak to
7 any types of causes of action, but I'll take
8 that a step further, which is, a typical
9 bankruptcy trustee can, regardless of in pari
10 delicto, could bring a cause of action for
11 contribution. Why wouldn't a SIPA Trustee be
12 able to bring that -- why would a SIPA Trustee
13 now have less rights than a bankruptcy trustee?
14 That makes no sense. That can't be what
15 customer protection means.

16 I want to go to -- I'm sorry to
17 speak so quickly.

18 You had asked for a cite before,
19 Your Honor. We had cited in our papers the
20 Klinger case, which is 41 N.Y.2d 362, which
21 cites McCabe v. Queensboro, which is 22 N.Y.2d
22 204, two cases, I believe both from the New York
23 Court of Appeals -- I assume from the cite
24 they're both from the New York Court of
25 Appeals -- that held that a defendant has a

1 right to bring a claim of contribution prior to
2 recovery.

3 I want to touch briefly on the
4 arguments by Mr. Moloney and Mr. Velie, and they
5 focus on facts and facts outside of this case.

6 The Trustee absolutely has brought
7 causes of action that he alleges harm the entire
8 estate. For the purposes of this action, those
9 have to be deemed true. To the extent we're
10 talking about causation, I gave one example
11 before, unfortunately, my time is limited, but
12 if you were to read our complaints, I think we
13 articulate exactly why. And just if I could
14 maybe give a very simple hypothetical, which is,
15 if you were a customer of Madoff and Madoff was
16 on the precipice of collapse in 2001, 2003,
17 various times, and new money came in, the entire
18 Ponzi scheme is prolonged. You don't have to
19 know why it's prolonged, you don't have to know
20 the identity of those that aided and abetted the
21 scheme to have a cause of action for damages.
22 Rather, you're damaged by the fact of the
23 prolonging of the scheme.

24 To that end, any -- I don't think
25 anyone would question that anybody who helped

1 Madoff inside, people who have confessed to
2 helping Madoff and are being sentenced, or
3 perhaps in jail already, certainly they were
4 strangers to customers, certainly nobody knew
5 their names ahead of time, certainly there was
6 no relationship ahead of time.

7 The way they were injured and the
8 reason they could proceed is because there was
9 an intentional tort and they were damaged. They
10 don't need to show a relationship. All they
11 need to show is that they were injured by that
12 defendant's conduct.

13 I want to touch again -- I'm sorry
14 to hop all over. You gave a lawnmower example
15 earlier about what happens to a lawnmower in a
16 bailment. The first thing I'd say is, to
17 counter some of the arguments by the defendants
18 is, no matter what in that example, the
19 lawnmower was not an juridical entity. That's
20 not the touchstone for whether a bailment exists
21 or whether a bailee could bring an action or the
22 bailor, frankly, for damage to the bailed
23 property.

24 The difference is in a case like
25 this, if you put your lawnmower with Madoff, you

1 would not share with creditors, you would not be
2 treated pro rata with creditors. You would get
3 your property back. And if we had to bring a
4 separate action, if the Trustee brought a
5 separate action on your behalf, it would be to
6 get back that property.

7 I see my time is up. If I could
8 address St. Paul --

9 JUDGE JACOBS: Go ahead.

10 MR. WARSHAVSKY: Okay. Now I'm
11 sorry for speaking so quickly.

12 JUDGE JACOBS: Well, it's mainly a
13 problem for our court reporter. Don't speed up.

14 MR. WARSHAVSKY: I'll try not to.

15 When we talk about St. Paul -- and
16 you had asked earlier about who owns the
17 claim -- and what St. Paul said -- and I don't
18 think what Appellees disagree -- St. Paul said
19 that if any creditor could bring the claim, it
20 becomes property of the estate, and that's not
21 the only case to hold that and it's for good
22 cause, because the whole purpose of the
23 Bankruptcy Code or the SIPA statute, for that
24 matter, is to avoid a rush to the courthouse, to
25 avoid various claims, and, frankly, it makes a

1 lot of sense from a judicial economy standpoint
2 not to have 4900 different plaintiffs suing
3 various defendants because of the same common
4 injury. It also is in keeping with a pro rata
5 distribution.

6 It's why -- and Your Honor had
7 addressed the automatic stay in the context of
8 St. Paul. In fact, we brought claims in that
9 regard here. I would point Your Honors to the
10 decision in Fox v. Picard, we cited it in our
11 papers, but there what the court held is that
12 St. Paul has broader implications than just a
13 debtor's alter ego.

14 St. Paul is -- the reason St. Paul
15 comes into play is because the -- you use the
16 term a general versus particularized claim.

17 Every --

18 JUDGE JACOBS: I'm not sure what it
19 means but -- in general.

20 MR. WARSHAVSKY: And I think St.
21 Paul or Fox and other cases that have
22 interpreted St. Paul speak to that, which is
23 that at the moment of insolvency, every Madoff
24 customer suffered the same injury. They didn't
25 suffer it to the same degree, but they suffered

1 by the virtue of the same injury because of the
2 insolvency.

3 To the extent they have claims, for
4 instance, against Bernard Madoff or, in a case
5 of St. Paul, against the debtor's alter ego,
6 well, everybody has been damaged equally, and
7 that's really the touchstone of the Trustee's
8 claims here, is that anybody -- these defendants
9 aren't the only defendants where the Trustee has
10 made these allegations. He's also made
11 allegations against the accountants, against
12 others who helped propagate this scheme.

13 And the point goes back to my
14 position with you earlier, Your Honor, which is
15 that anybody who suffered by their -- by virtue
16 of this fraud suffered -- their suffering was
17 increased each time the scheme was prolonged,
18 each time the scheme was propagated.

19 And our position is that those that
20 helped propagate the scheme, those that we have
21 accused of aiding and abetting the fraud and
22 helping to propagate it, should pay their fair
23 share.

24 I'd say also, frankly, when we're
25 discussing Wagoner and its progeny as well, I

1 spoke about customer. I also harken back to
2 Your Honor's Net Equity decision here.

3 Here what we're talking about is
4 bringing back investors their principal. We're
5 not talking -- we keep talking about damages. I
6 know that's the only way to think about it, but
7 we're not talking about expectation damages or
8 anything. All we're talking about here is
9 filling the Fund of Customer Property, getting
10 back each investor, some who were 30, 40 years
11 in Madoff back to sea level. That's all we're
12 doing.

13 Thank you. Thank you for the extra
14 time.

15 MR. LA ROSA: I just wanted to make
16 a couple of additional points, Your Honors. In
17 thinking about bailment, I just encourage you,
18 as I said at the beginning of my presentation,
19 to go back and look at the really very simple
20 elements that are necessary to create a bailment
21 applied under the law. It's lawful possession
22 and a duty to account for the bailed property as
23 the property of another. Both of those elements
24 are pretty clearly satisfied here. You've got
25 lawful possession per 15c3-3 and you've got a

1 statute -- first a regulatory and then a
2 statutory duty to account for this as property
3 to another. That's, I think, clear on the basis
4 of both the regulation and the statute.

5 There's a lot of talk about the
6 real bailment being customer named securities,
7 not customer property. And that is really --

8 JUDGE JACOBS: But there's
9 something to that --

10 MR. LA ROSA: Well -- go ahead.

11 JUDGE JACOBS: -- because if a
12 raincoat is dropped off at the dry cleaner, you
13 expect the dry cleaner to handle and clean the
14 raincoat. You don't expect the dry cleaner to
15 wear it.

16 MR. LA ROSA: Well, that's true but
17 --

18 JUDGE JACOBS: And if you deposit
19 securities with a broker, with a broker/dealer,
20 they can use it for various purposes.

21 MR. LA ROSA: Well, but they always
22 have to have like securities in their possession
23 or control reserved for you, right? I mean,
24 they can't -- yes, they can use the particular
25 securities -- it just really points out the

100

1 distinction between non-fungible and fungible
2 property. Customer name security is a security
3 that's non-fungible, it's registered in your
4 name particularly.

5 A street name security which is
6 held in the name of the broker/dealer but can be
7 used in -- you know, as long as the
8 broker/dealer has -- if the broker/dealer owes
9 50,000 shares of IBM to its customers, so long as
10 it has at least 50,000 shares of IBM available
11 for delivery to its customers --

12 JUDGE JACOBS: So that's going back
13 to the grain silo?

14 MR. LA ROSA: Yes, it's --
15 effectively it's just the application of
16 bailment principles to fungible property, which
17 is what street name securities are, they're
18 securities that are held in the name of the
19 broker/dealer for the benefit of the
20 broker/dealer's customer. Typically, you know,
21 broker/dealer would have an omnibus account at a
22 clearing corporation in which it would hold all
23 of the securities that it's holding for
24 customers and then it would allocate those
25 securities to individual customers on its own

1 books and records.

2 But the fact -- I mean, if your --
3 the raincoat example is a little difficult
4 because it may be a very special raincoat to
5 you, but, I mean, if it were a raincoat -- if
6 you didn't care particularly about the make or,
7 what have you, of that raincoat, just so long as
8 the cleaners gives you back an identical
9 raincoat, one that's functionally equivalent,
10 you wouldn't care. It would be --

11 JUDGE JACOBS: Well, I'm not sure
12 about that.

13 MR. LA ROSA: Well, it may be
14 non-fungible. The point is that the statute
15 recognizes a distinction that's implicit in
16 bailment law between non-fungible and fungible
17 property. The fact that it has different rules
18 applying to fungible property doesn't mean that
19 a bailment isn't created. It just means that
20 it's a bailment relating to non-fungible -- to
21 fungible property and that the rules are
22 different there.

23 With regard to Wagoner, I don't
24 know that the case was even mentioned, but we've
25 relied very heavily on the Bateman Eichler

1 doctrine.

2 Wagoner is based on a -- is a
3 transposition of the state law defense of in
4 pari delicto to federal standing, but
5 effectively it is an adoption of that defense.
6 There's no distinction that we can discern
7 between the contours of the federal standing
8 doctrine under Wagoner and the state law defense
9 of in pari delicto.

10 There is a line of cases decided by
11 the Supreme Court starting with Bateman Eichler,
12 to the effect that when a state law defense, an
13 equitable defense like in pari delicto, would
14 interfere or frustrate the goals or purposes of
15 the federal statutory or regulatory scheme, then
16 it's not applicable, it's displaced. We think
17 that principle is applicable here.

18 The primary, if not the exclusive
19 purpose of Rule 15c3-3 --

20 JUDGE CARNEY: Excuse me. Would
21 that also apply -- would that argument also
22 apply to a regular Chapter 7 bankruptcy trustee
23 or just special to SIPA?

24 MR. LA ROSA: Well, I mean,
25 depending upon the context it could, but there

1 are particular purposes that Rule 15c3-3 and
2 SIPA have that would be deeply frustrated by the
3 application of in pari delicto. There's a
4 bailment that's created by those provisions.
5 That bailment enables the Trustee to recover
6 customer property. Look, the over -- the
7 principal, if not the only purpose really of 3-3
8 and SIPA is to ensure that customers get back
9 the property that they've entrusted to a
10 broker/dealer, that the broker properly performs
11 its custodial function and if it doesn't, that
12 customers don't suffer because there's been a
13 breakdown in that custodial function.

14 If you -- if you say that a Trustee
15 who had no part in the wrongdoing of a
16 broker/dealer is still tainted by the
17 broker/dealer's participation in that wrongdoing
18 and, therefore, can't recover as a result of it,
19 you would be prohibiting the Trustee from
20 recovering property that would be ultimately
21 allocated and distributed to customers for their
22 benefit. It would frustrate the primary -- it
23 is called the Securities Investor Protection
24 Act. It would frustrate the primary goal of the
25 statute and the regulation to apply the

1 doctrine, and so we think Bateman Eichler
2 displaces Wagoner in this context.

3 JUDGE JACOBS: Thank you.

4 MR. LA ROSA: Thank you.

5 JUDGE JACOBS: Thank you all.

6 The Court is grateful to counsel
7 for expert argument on all sides. We will
8 reserve decision.

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10 (Time noted: 12:40)

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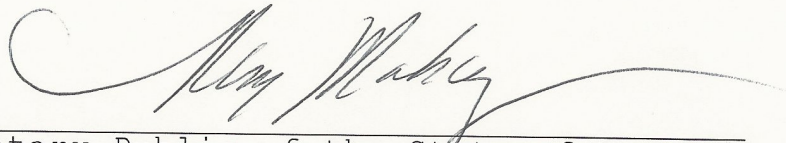
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C E R T I F I C A T E

I, NANCY MAHONEY, a Certified Court Reporter and Notary Public of the States of New Jersey and New York, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any party in this action and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the event nor outcome of this action.



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